

Arkansas Court of Appeals  
Not Designated for Publication  
Sam Bird, Judge

CACR05-1147

MAY 24, 2006

DIVISION III

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT  
[NO. CR04-2702]

KELLY LAMBERT

APPELLANT

HON. WILLARD PROCTOR, JR.,  
JUDGE

AFFIRMED

V.

STATE OF ARKANSAS

APPELLEE

Appellant Kelly Dwayne Lambert was convicted by a jury of rape and sentenced to fifteen years in the Arkansas Department of Correction. His sole contention on appeal is that the trial court erred in refusing to allow him to present evidence that the victim was abused by her mother. We affirm.

The victim, T.S., was fourteen years old at the time of the trial. She testified that “something bad started happening” when she was “about five” years old. At that time, she was living with her mother, Therese Oliver; her brothers and sisters; and her stepfather (appellant) on 24th Street in Little Rock. T.S. said that appellant would touch her in “certain spots” and would call her into the bedroom that he shared with her mother. She said that he would “grip” her buttocks and, while he was doing that, she was “pulling his nipples.” She said that he also pulled her nipples.

She further testified that, when she got older, appellant “would call [her] into the room and have [her] get fully undressed.” She also stated as follows:

He [appellant] would have me spread my legs or he would have me put my mouth on his penis. He would keep his shirt on and his underpants pulled down. ... He would have me put his penis in my mouth or he would do it. He would just tell me to do it. He touched me with his hands or his penis. He would use his hands to rub me or grab me on my buttocks and my vagina and stuff. ... He would touch me on the outside of my vagina. He was trying to put his penis in my vagina and it did happen. He would shove it in there and make it thick. He put lotion on his penis. It would not go inside my vagina completely. When this happened he would go on to having me put his penis in my mouth.

T.S. said that the abuse continued after the family moved from 24th Street to Hosie Lane, where they lived for a “year or two.” Thereafter, the family moved to “trailer parks for a year or two,” and T.S. said “the same thing happened at the trailer park.”

During cross-examination, defense counsel questioned T.S. about whether she recalled her mother “using a belt” on her, and the State objected. The following colloquy then occurred:

PROSECUTOR: Relevance objection as to why eliciting her mother spanking her with a belt is relevant.

DEFENSE COUNSEL: I’m trying to keep from having to re-call her, but last time we got into bed wetting and she testified that her mom would beat her with a belt after she wet her bed<sup>1</sup> and they were making – I don’t know if they are going to go into this or not, but they were making an assumption that the bed wetting had something to do with the sexual abuse instead of physical causes or anything like that. And this was fully explored in the last trial. I know this is a different objection now, but I think the question of whether or not her mom punished her for – I’m going to ask some other questions too.

PROSECUTOR: I just don’t think it’s come up yet to be relevant. No one has asked her that. It has just come out of the blue: Did your mom beat you with a belt.

THE COURT: Are you guys going to bring up the bed wetting?

PROSECUTOR: I don’t intend to ask about that. I don’t know if something is asked that she will say that.

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<sup>1</sup> The parties refer to a previous trial during which they discussed this subject.

THE COURT: With any of your other witnesses?

PROSECUTOR: I don't intend to ask Dr. Jones about that.

DEFENSE COUNSEL: In the last hearing, I asked and I am about to ask if the mother had said, What stays in this house – what happens in this house stays in this house. And I am just saying that the mom –

THE COURT: That's not a problem. If you are not going to bring up anything about bed wetting –

PROSECUTOR: My objection would be, what does that have to do with the allegation against Mr. Lambert? I just don't – it's like an attempt to bash her mother without actually having her on the stand to do it.

THE COURT: Well, I think she has already answered the question like that. So leave it like that, and I will ask you to move on, especially in light of the fact that the State is not going to get into the bed wetting.

T.S.'s seven-year-old half-sister also testified at the hearing. She said that her father, the appellant, made her "touch him in his privates" when they were at her grandmother's house.

Dr. Jerry Jones, a pediatrician, testified that he worked at Children's House, a facility located on the campus of Arkansas Children's Hospital, where doctors evaluate children who are suspected of having been physically or sexually abused. Dr. Jones said that he performed an evaluation of T.S. and that his findings were consistent with past sexual abuse.

Ernest Lambert, appellant's brother, and Charlesetta Lambert, appellant's mother, testified on behalf of appellant. During Charlesetta's testimony, defense counsel questioned her about T.S.'s bed-wetting and Charlesetta explained that T.S. "had a bruise, you know, got a bruise. Got a whipping because she had wet the bed." When asked who gave T.S. the bruise, Charlesetta replied, "Her mother." The State objected, and the following colloquy occurred:

PROSECUTOR: Objection. May we approach? My first objection is now we're

into bed wetting, which he did not want brought up initially and he has brought it up. Secondly, he is – I don't see how this beating that occurred at some undetermined time is relevant to the allegations before this jury today and I let it go on and on and on, but I am going to have to object now because we're back to blaming it all on Therese Oliver once again.

DEFENSE COUNSEL: I have a right to blame it on Therese Oliver. We were talking about the conditions of the house, and they lived in a house. There [are] allegations that he was staying in that house with them alone, all the time, over and over. Hundreds of times is what the child had said, and this house was in deplorable condition.

There is also the fact that with this child – I mean, if she is getting a beating for wetting the bed, then what she says is going to be suspect. I think the jury has a right to evaluate what goes on in that house and how that mother disciplines the child because that impacts what she says at that time and then again in court today.

PROSECUTOR: And once again, I don't see how that is relevant to the allegations. I just don't see what Therese Oliver's character has to do with – I just – I don't see it, but –

THE COURT: Okay. I will sustain the objection at this point. Just ask you to move on.

Appellant now contends that the trial court erred in refusing to allow him to present evidence that T.S. was abused by her mother because such evidence was “relevant to show that the mother abused [T.S.] and raise[s] the question of just what [T.S.] would do or say to keep from being whipped with a belt.” Appellant also claims that “evidence establishing the circumstances under which a child prosecutrix makes allegations of sexual abuse toward one family member as opposed to another is not only relevant but is critical evidence for the jury to consider in its determination of the credibility of the minor prosecutrix.” Appellant thus asserts that, by forbidding the evidence, “the trial court denied the jury the opportunity to consider the question of the very real possibility that living in those conditions with a

mother who disciplines as she does impacts what [T.S.] says and has said.” For these reasons, appellant asks this court to reverse appellant’s conviction for the rape of T.S.

A ruling on relevancy is discretionary, and the trial court’s decision will not be reversed unless an abuse of discretion is found. *Griswold v. State*, 304 Ark. 168, 801 S.W.2d 270 (1990). Relevant evidence is any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ark. R. Evid. 401.

We find no abuse of discretion by the trial court in refusing to allow evidence that T.S. was abused by her mother. First, assuming that the abuse actually occurred, we cannot see how T.S.’s being abused by her mother could make it more or less likely that the appellant committed rape. Moreover, appellant has presented no convincing argument that any abuse of T.S. by her mother would necessarily affect T.S.’s credibility. We therefore hold that the trial court did not abuse its discretion in refusing to allow evidence of any such abuse.

Affirmed.

GLOVER and CRABTREE, JJ., agree.